PP

v.

YEN KEE SEW

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CRIMINAL TRIAL NO: 45-8-98]
19 NOVEMBER 1998

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in heroin - Proof - Dangerous Drugs found unconcealed in bedroom of house - Accused in living room of house and in possession of keys to house - Whether accused occupier of house - Whether in possession of heroin - Presumption - Whether presumed to be trafficking in heroin - Dangerous Drugs Act 1952, ss. 37(da)(i), 39B - Evidence Act 1950, s. 114(g)*

The accused was charged with trafficking in 178.9 grams of heroin under s. 39B of the Dangerous Drugs Act 1952 ('the DDA'). Before the learned judge, evidence was led by the prosecution that: (i) on 12 December 1996 a police party had raided a house in Taman Keladi, Sungai Petani; (ii) at the time of the raid the accused was seen standing in the living room of the house; (iii) in one of the bedrooms the police found the dangerous drugs in question, which were unconcealed and placed openly in basins and on old newspapers; and; (iv) traces of heroin were found on the accused's body after cotton swabs were done on his person. These evidence apart, through the house owner ('SP1'), the prosecution elicited evidence that SP1 had rented the house to the accused and had given the house keys. SP1 however also testified that: (i) he had met the accused only once and did not know his name; (ii) the accused was introduced to him by a Chinese lady ('the orang tengah') whose name he did not know; and (iii) he had executed a written tenancy agreement with the orang tengah in respect of the house, but had lost the document. The primary question that arose was whether the evidence, as adduced, was sufficient to support a case of trafficking against the accused.

Held:

[1] The accused was not found to be in *physical* possession of the heroin. He was not found carrying the drug in any package, packet, bag, container etc. and there was no evidence that he was the one who had brought the heroin to the room.

[2] The accused was not proved to be the occupier of the house. The facts that the accused was present in the living room of the house at the time of the raid, *albeit* alone, and having possession of a set of keys to the house are insufficient for the purpose of proving that the accused was an occupier of either the room where the heroin was found or the house.

[3] SP1's credibility is doubtful. His evidence on the issue of tenancy was far from satisfactory and a question arises as to who was actually the tenant of the house. SP1's claim that the accused was his tenant was inconsistent with the tenancy agreement which SP1 had concluded with the orang tengah. SP1's evidence on this and other matters were sketchy and lacking in essential details, and somewhat confusing, and the prosecution owed the court an explanation for that. The fact remains, however, that the prosecution had failed to prove beyond reasonable doubt that the accused was the tenant of the premises.

[4] In the light of the quality of SP1's evidence, the best person to clear the air was the orang tengah. However, the orang tengah, despite being present during the trial and called into court for identification, was not called to testify. The orang tengah's evidence was very relevant and it was evidence that could have been produced. That being so, the presumption under s. 114(g) of the Evidence Act, 1950 ought to be invoked against the prosecution for failing to call the orang tengah to testify.

[5] The facts that the accused was neither the owner nor the tenant or occupier of the house, and was found not in the room where the heroin was found, could only mean that the prosecution has failed to prove beyond reasonable doubt that the accused was in possession of the heroin. The position obtaining must remain so, notwithstanding that traces of heroin were found on the accused's body. If the prosecution failed to prove possession then the court could not invoke the presumption of trafficking under s. 37(da)(i) of the DDA.

[Accused acquitted and discharged.]

Case(s) referred to:
Chan Pean Leon v. PP [1956] MLJ 237 ***(foll)***
R v. Hinde [1977] 64 Cr App R 213 ***(refd)***
PP v. Johari Abdul Kadir [1987] 2 CLJ 66 ***(foll)***
PP v. Kau Joo Huat [1988] 1 CLJ 477 ***(foll)***
Toh Ah Loh & Mak Thim v. R [1949] 54 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 37(da)(i), 39B
Evidence Act 1950, s. 114(g)

For the prosecution - Ahmad Zaidi Ibrahim DPP
For the accused - Sithambaram; M/s Kumar, Sitham & Co

Reported by WA Sharif

JUDGMENT

Hishamudin Yunus J:

The accused was charged for trafficking in heroin at a single storey terrace house in Sungai Petani on 12 December 1996. The alleged amount of heroin was 178.9 grams. It is a prosecution pursuant to s. 39B of the Dangerous Drugs Act 1952 (the "DDA").

The prosecution adduced the following evidence. On the day in question (12 December 1996) at about 1.30pm a police raiding party raided a house in Taman Keladi, Sungai Petani. The raiding party consisted of twelve police personnel was lead by one DSP Abdul Manaf. At the scene and just before the raid, two teams of officers were formed, one led by Chief Inspector Greggory Jarret (SP5) and the other led by Chief Inspector Nordin. These two teams were directed to approach the house from the front, while three other officers were directed to approach the rear part of the house. SP5 knocked on the door of the house shouting, "Polis! Polis! Buka pintu!" As there was no response, SP5 then broke several glass louvers of the front window and through the broken louvers he saw a Chinese man – the accused – wearing a pair of long pants but shirtless standing in the living room. The accused was holding his hands up and looking in the direction of SP5. SP5 ordered him to open the front door, which he did. SP5 then ordered the accused to open the grill door as it was locked but he seemed not to have the key. Thereafter, SP5 asked one of his men to cut the padlock by means of a cutter.

Upon entering the house, SP5 identified himself as a police officer and showed the accused his authority card.

The house had three rooms. In one of the rooms, a certain amount of substance suspected to be heroin was found. Some were found placed in basins while some were also found placed on old newspapers. The basins and newspapers, together with the substances, were found unconcealed. They were found on the floor of the room and could be easily seen by anyone entering the room.

The substances were subsequently sent to the Government chemist (SP4) for analysis and were confirmed to be heroin.

Apart from the accused, there was no one else in the house at that time.

At the close of the case for the prosecution, I found that the prosecution had failed to prove its case beyond reasonable doubt (as the alleged offence took place in 1996, the pre-amended s. 180 of the Criminal Procedure Code applies).

The prosecution did not prove directly that the accused was trafficking in heroin. The approach taken by the prosecution was first, to prove, that the accused was in possession of 178.9 grams of heroin and thereafter to rely on the presumption of trafficking under s. 37(da)(i) of the DDA which states:

> (da) any person who is found in possession of:
>
> (i) 15 grams or more in weight of heroin;
>
> ...
>
> Otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

The question, therefore, arises: on the evidence presented before the court, did the prosecution succeed in proving possession (the presumption would only be triggered if possession could be proved)?

It is my judgment that the prosecution had failed to prove possession beyond reasonable doubt. I shall give my reasons.

First the accused was not found by the key witness, SP5, to be in physical possession of the heroin. On this, I think, the evidence is very clear. The drug was not found on his body. He was not found carrying the drug in any package, packet, bag, container, luggage, etc. Nor was the heroin found in any container, bag, package, luggage or packet proved to be in the possession of, or belonging to, the accused. Indeed, he was not even found to be in any way in physical contact with the heroin. There was also no evidence that it was the accused that brought the heroin to the room in the first place.

Second, the accused was not found in the room where the heroin was found. He was found standing in the living room while the heroin was found in one of the three bedrooms of the house.

Third, it was not proven beyond reasonable doubt that the accused was the occupier of the house. The facts of merely being present in the living room of the house at the time of the raid, albeit alone, and having possession of a set of keys to the house are, in my view, insufficient for the purpose of proving that the accused was an occupier of either the room (where the heroin was found) or the house. More facts need to be proved. Indeed, there was no evidence by anyone, including the house owner himself, that the accused regularly visited or occupied the house.

Instead, what was established by the evidence was that the accused was not the owner of the house. The owner of the house was one Encik Seng Bak Hoi (SP1). SP1 never gave evidence that the accused was the occupier of the house.

Was the accused then a tenant of the house? The prosecution endeavoured to prove that the accused was the tenant of the house through the evidence of SP1. But on the issue of tenancy, SP1's evidence was far from satisfactory. He (SP1) stated in evidence that the accused was the tenant and that he gave him a set of keys to the house; and that the rent was RM130 per month. However, he did not know the tenant's (accused's) name. He met the accused only once and that was only at the time of giving the set of keys. He said a Chinese lady, whose name he also did not know but who acted as a "middle person" ("orang tengah"), brought the accused to him. He said he did not know how many people stayed in the house. There was no evidence that SP1 ever visited the house after having given the set of keys to the accused. Nor did he sign any tenancy agreement with the accused. There was no evidence as to how the rent was paid. It could not have been paid personally and directly by the accused to SP1 because SP1 had already said that he met the accused only once. So, was it paid by post? Or was it paid by means of standing instruction to a bank? Or was it paid to an agent of SP1? Or was it paid through this orang tengah? Was any receipt issued to the accused or to anyone at all?

To complicate matters, or, rather, to further blur the situation, SP1 did give evidence that there was in respect of the same premise a written tenancy agreement between him and the middle person (the lady, the orang tengah). SP1 further claimed that the tenancy agreement had been lost. If the accused was SP1's tenant, as the latter had claimed, then how come SP1 entered into a tenancy agreement with the said lady, the so-called middle person? Who was actually the tenant? Why did SP1 refer to this Chinese lady as the orang tengah, if, indeed, there was a tenancy agreement between him and her? How did this Chinese lady become an orang tengah? What did SP1 actually mean by orang tengah? What was actually her role? The prosecution owed the court an explanation since the evidence of SP1 was sketchy and lacking in essential details and somewhat confusing.

I seriously doubt the credibility of SP1. First, he did not know the name of his own (allegedly) tenant! He never personally asked the accused for his identity card (however, SP1 claimed that he did ask for the accused's identity card through the orang tengah but was not successful in getting it). Second, he met the accused only once. Not only that. He also claimed that he did not know the name of the middle person who introduced the tenant to him!

Further, on the one hand he said the said Chinese lady was a middle person (orang tengah), but when cross-examined, he said he had entered into a tenancy agreement with the said lady in respect of the same premises. So, who was actually the tenant: the accused (with whom no written tenancy agreement was made) or the said lady? It is also remarkable when SP1 alleged that he had lost the tenancy agreement!

In the light of the quality of SP1's evidence, the best person to clear the air would be the said Chinese lady (the said orang tengah) herself who was in fact present outside the court room during the trial and was called by the learned DPP for the purpose of identification by SP1. But, alas, for reasons best known to the prosecution, she was not called to testify on behalf of the prosecution.

The learned defence counsel submitted that in the light of the failure on the part of the prosecution to call the said Chinese lady to testify, the court should invoke the presumption under s. 114(g) of the Evidence Act. I did so invoke. For I think there is substance in this contention. Her evidence was very relevant and it was evidence that could have been produced. I presume that had this so-called orang tengah been called, her evidence would have been unfavourable to the prosecution.

Accordingly, I am of the view that the prosecution had also failed to prove beyond reasonable doubt that the accused was the tenant of the premises.

What is the meaning of "possession" in the context of the DDA? The term is not defined in the Act. This is understandable. For it has long been recognized by both judges and jurists that the concept of "possession" is a difficult one (see, for example, the observation of Bridge LJ in *R v. Hinde* [1977] 64 Cr. App. R 213; and RWM Dias, *Jurisprudence*, 5th edn. 1985 Ch. 13). In the light of this difficulty, our Parliament has deemed it fit to leave it to the courts to interpret the term and to determine whether the facts of the particular case before the court tantamount to possession.

And to assist the prosecution in its difficult task of proving possession the legislature has deemed it fit to insert a section (in the form of s. 37(d), DDA) providing for the presumption of possession – but we are not concerned with that in the present case.

However, be that as it may, our courts have over the years enunciated broad principles governing the interpretation of this vague term. Such principles could be found in *Chan Pean Leon v. Public Prosecutor* [1956] MLJ 237, *Toh Ah Loh & Mak Thim v. R* [1949] 54, *Public Prosecutor v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 2 MLJ 91, *Public Prosecutor v. Johari bin Abdul Kadir*

[1987] 2 CLJ 66, and several other cases. Applying these broad principles which to my mind provide no more than mere general guidelines, it is my judgment that, based on the evidence and facts of the case before me, in particular, the fact that the accused was neither the owner nor the tenant or the occupier of the house, and that he was found not in the room where the heroin was found but in the living room at the time of the raid, the prosecution has failed to prove beyond reasonable doubt that he was in possession of the heroin. If the prosecution failed to prove possession then the court could not invoke the presumption of trafficking under s. 37(da)(i) of the DDA.

It is, however, true that the chemist (SP4) confirmed that the cotton swabs (done on the accused's person by the Investigating Officer, SP6) indicated that traces of heroin were found on the accused's body. But this evidence coupled with the evidence that he was found alone in the house, whose front and rear doors were locked, are, in my judgment, insufficient to compel me to infer that he was in possession of the alleged drugs. At the most, the evidence and the surrounding circumstances taken as a whole would cause any reasonable man to suspect that the accused was in some way associated with the drug found in the house. But in a criminal case suspicion alone, however strong, is insufficient to form the basis of any conviction. Guilt has to be proven beyond reasonable doubt.